UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TODD C. BANK, Individually and on Behalf of All Others Similarly Situated, *Plaintiff*, -against- INDEPENDENCE ENERGY GROUP LLC, and INDEPENDENCE ENERGY ALLIANCE LLC, *Defendants*.	1:12-cv-01369-JG-VMS

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

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INTRODUCTION

Plaintiff, Todd C. Bank ("Bank"), by the undersigned counsel, submits this Memorandum of Law in opposition to the motion by Defendants, Independence Energy Group LLC and Independence Energy Alliance LLC (collectively, "Independence Energy"), for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

ARGUMENT

POINT I

PLAINTIFF'S INDIVIDUAL CLAIMS ARE NOT MOOT

A. Several Circuit Courts, Including the Second Circuit, Have Assumed, Without Deciding, That an Unaccepted Rule 68 Offer of Judgment for a Plaintiff's Maximum Potential Recovery Moots the Plaintiff's Claims

In *Doyle v. Midland Credit Mgmt., Inc.*, 722 F.3d 78 (2d Cir. 2013), the court affirmed the dismissal of a claim that the court assumed to have been mooted by the defendant's unaccepted Rule 68 offer of judgment for the plaintiff's maximum potential recovery. However, the issue in *Doyle* was not whether an unaccepted offer of judgment could moot a claim; rather, the issue was whether "offers of judgment . . . [must] *comply with Rule 68* in order to render a case moot under Article III." *Id.* at 79 (emphasis added).[1] Therefore, *Doyle*, having not decided the broader issue, *i.e.*, whether an unaccepted offer of judgment (whether or not made pursuant to Rule 68) could moot a claim in the first place, does not control the instant motion. *See Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-479 (2006).

For the proposition that a Rule 68 offer for a plaintiff's maximum potential recovery moots the plaintiff's claims, *Doyle* cited only one case: *Abrams v. Interco, Inc.*, 719 F.2d 23 (2d Cir. 1983). *See Doyle*, 722 F.3d at 80. However, in *Abrams*, in which the district court had denied the plaintiffs' motion for class certification and the Second Circuit had affirmed that denial, *see Abrams, Inc.*, 719 F.2d at 32, the issue was not whether the named plaintiffs' *individual* claims were still justiciable, but whether their *class* claims were. *Abrams* likewise did not decide the issue, but instead held that the putative class representative, who was offered the maximum potential recovery for his *individual* claims, ceased to have standing to pursue *class* claims where, reasoning that the facts before the court would "seem to have become the hypothetical described in [*Deposit Guaranty Nat'l Bank v.*] *Roper*, 445 U.S. [326] at 333 [(1980)], to wit, a 'final judgment fully satisfying [the] named plaintiffs' private substantive claims', and there is no justification for taking the time of the court and the defendant in the pursuit of minuscule individual claims which defendant has more than satisfied." *Id.* Indeed, the court stated that it read the district court's Rule 68-based judgment in favor of the plaintiffs (that is, the judgment that was issued based upon the defendant's unaccepted offer of judgment) "to mean that if we were to reverse the denial of class certification, [the] plaintiffs' individual claims would be reinstated." *Id.* at 32.

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[1] Independence Energy's reference to the true but irrelevant fact that the plaintiff in *Doyle* "was represented by Plaintiff in the instant action," Def. Mem. at 7, appears to serve no purpose other than as an attempt to bias this Court.

Just as *Abrams* assumed but did not decide the question of individual mootness, neither did *McCauley v. Trans Union, LLC*, 402 F.3d 340 (2d Cir. 2005), in which the court addressed only the question of whether a plaintiff whose claim was assumed to have been mooted by an offer of judgment is entitled to a judgment in the amount of the offer *or* whether the defendant is entitled to a judgment of dismissal.

Other courts have also made the same assumption that the Second Circuit has made. *See Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004) (in which the issue was whether the class claims remained live upon the mooting of the named plaintiff's individual claims)[2]; *Boyle v. Int'l Brotherhood of Teamsters Local 863 Welfare Fund*, No. 12-4578, – Fed. Appx.– , 2014 WL 4235045, *1-*2 (3d Cir. Aug. 28, 2014) (in which the issue was whether the offer had, *in fact*, been for the maximum recovery); *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 370-373 (4th Cir. 2012) (same); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 575 (6th Cir. 2009) (same)[3]; *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011) (addressing whether the defendant's settlement offer was "'definite and certain,'" *id.* at 893, and whether the offer was required to be formally made under Rule 68, *see id.* at 894); *Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999) (like *McCauley*, addressing whether a plaintiff whose claim was mooted by an offer of judgment is entitled to a judgment in the amount of the offer or whether the defendant is entitled to a judgment of dismissal)[4]; *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1240, 1243 (10th Cir. 2011) (addressing the question of whether, following the *assumed* mooting of the named plaintiff's individual claims, the class claims remained justiciable); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920-921 (5th Cir. 2008), *abrogated on other grounds*, *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013) (same).[5]

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[2] In *Weiss*, the court cited *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991). *See Weiss*, 385 F.3d at 340. In *Rand*, the court relied solely upon *Alliance to End Repression v. City of Chicago*, 820 F.2d 873 (7th Cir. 1987), *see Rand*, 926 F.2d at 598; and, in *Alliance to End Repression*, the court found that the class claims were moot where the parties had agreed to a monetary settlement even though the parties had also agreed that the plaintiffs could seek a declaratory judgment and that neither party could appeal the district court's decision of whether to grant the declaratory judgment, *see Alliance to End Repression*, 820 F.2d at 874, finding that "[t]h[e] case was settled before the [district] judge decided it." *Id.* at 875.

[3] The *O'Brien* court cited, for the proposition that "there [i]s no longer any case or controversy when defendants ha[ve] offered [a plaintiff] the full amount of damages to which the plaintiff claimed entitlement," *id.* at 370, only one case, *i.e.*, *Zimmerman v. Bell*, 800 F.2d 386 (4th Cir. 1986), *see id.*, which, in turn, relied solely upon *Abrams*, *supra*. *See Zimmerman*, 800 F.2d at 390.

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[4] In *Genesis Healthcare*, the Court observed that "[s]ome courts maintain that an unaccepted offer of complete relief alone is sufficient to moot the individual's claim." *Genesis Healthcare*, 133 S. Ct. at 1529, n.4, citing *Weiss*, *supra*, 385 F.3d at 340, and *Greisz*, *supra*, 176 F.3d at 1015. Here, *Genesis Healthcare* was referring to the question of whether, *assuming* that an unaccepted offer of judgment has mooted a plaintiff's claims, the plaintiff is entitled to a judgment for the *amount of the offer*, or, as *Weiss* and *Greisz* found, the *defendant* is entitled to a *judgment of dismissal*. *See Weiss*, 385 F.3d at 340 ("[o]nce the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate and a plaintiff who [does not accept the offer and thereby] refuses to acknowledge this *loses outright* [such that the defendant is entitled to a judgment in its favor] under Fed.R.Civ.P. 12(b)(1), because he has no remaining stake" (citation and quotation marks omitted); *accord*, *Greisz*, 176 F.3d at 1015.

Further showing that the issue in *Greisz* and *Weiss* to which *Genesis Healthcare* was referring was the issue concerning *which* party was entitled to a judgment in the event of the *assumed* mootness of a plaintiff's individual claims, *Genesis Healthcare* contrasted *Greisz* and *Weiss* with "[o]ther courts [that] have held that, in the face of an unaccepted offer of complete relief, district courts *may 'enter judgment in favor of the plaintiffs* in accordance with the defendants' Rule 68 offer of judgment." *Id.* at 1529, n.4, quoting *O'Brien*, *supra*, 575 F.3d at 575 (emphasis added), and citing *McCauley*, *supra*.

[5] The courts in each of the circuit cases that *Sandoz* cited regarding individual mootness had also assumed that the named plaintiffs' individual claims were moot, and instead addressed the question of whether the *class* claims were moot. *See Sandoz*, *supra*, 553 F.3d at 921, n.5, citing *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030 (5th Cir. 1981) (in which the issue was whether "a purported but uncertified class action [should] be dismissed for mootness upon tender to the named

B. The Only Result of Plaintiff's Decision Not to Accept Defendants' Offer of Judgment Was, as Rule 68 of the Federal Rules of Civil Procedure States, That the Offer Was Deemed Withdrawn

In *Genesis Healthcare*, the majority addressed the question of whether collective claims in an action brought under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA"), remained justiciable following the assumed mootness of the named plaintiff's individual claims, such mootness having resulted from an unaccepted Rule 68 offer for the plaintiff's maximum potential individual recovery. The dissent, however, argued that the Court should have addressed the question of whether the named plaintiff's individual claims had, *in fact*, been mooted: "[e]mbedded within th[e] question [that the majority addressed] is a crucial premise: that the individual claim *has* become moot, as the lower courts held and the majority assumes without deciding." *Genesis Healthcare*, 133 S. Ct. at 1532 (Kagan, J., dissenting) (emphasis in original).

In addressing the question of individual mootness, the dissent explained that the general rule that an unaccepted *non-Rule 68* settlement offer does not moot a plaintiff's claims *applies equally* where an offer *is* made under Rule 68:

> "[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." [*Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2012)] (internal quotation marks omitted). By those measures, *an unaccepted offer of judgment cannot moot a case*. When a plaintiff rejects such an offer—however good the terms— her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. *An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect*. As every first-year law student learns, the recipient's rejection of an offer "leaves the matter *as if no offer had ever been made*." *Minneapolis & St. Louis R. Co. v.*

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plaintiffs of their personal claims, despite the existence of a timely filed and diligently pursued pending motion for class certification," *id.* at 1041 (emphasis added)); *Weiss*, *supra*; and *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991), which is discussed in note 2, *supra*.

> *Columbus Rolling Mill,* 119 U.S. 149, 151 (1886). *Nothing in Rule 68 alters that basic principle*; to the *contrary*, that rule *specifies* that "[a]n *unaccepted offer* is considered *withdrawn*." Fed. Rule Civ. Proc. 68(b). So assuming the case was live before—because the plaintiff had a stake and the court could grant relief—the litigation carries on, unmooted.

Id. at 1533-1534 (Kagan, J., dissenting) (emphases added).

In addition, the dissent specifically explained why it is irrelevant that an offer made pursuant to Rule 68 includes an offer by the defendant to have a *judgment* issued in favor of the plaintiff:

> The text of the Rule contemplates that a court will *enter judgment only when a plaintiff accepts an offer*. *See* Rule 68(a) ("If. . . the [plaintiff] serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment"). *And the Rule prohibits a court from considering an unaccepted offer for any purpose other than allocating litigation costs—including for the purpose of entering judgment for either party*. *See* Rule 68(b) ("Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs"). That injunction accords with Rule 68's exclusive purpose: to promote *voluntary cessation of litigation by imposing costs on plaintiffs who spurn certain settlement offers*. *See Marek v. Chesny*, 473 U.S. 1, 5 (1985). The Rule provides *no appropriate mechanism for a court to terminate a lawsuit without the plaintiff's consent*.

Id. at 1535-1536 (Kagan, J., dissenting) (emphases added).

C. Numerous Post-*Genesis Healthcare* Cases Have Adopted the Reasoning of the *Genesis Healthcare* Dissent and Held That an Unaccepted Rule 68 Offer of Judgment for a Plaintiff's Maximum Potential Recovery Cannot Moot the Plaintiff's Claims

Both Courts of Appeals to have addressed the issue of whether a plaintiff's claims are mooted by an unaccepted Rule 68 offer of judgment for the plaintiff's maximum potential recovery have held in the negative. In *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948 (9th Cir. 2013), the Ninth Circuit became the first of two post-*Genesis Healthcare* Circuit Courts to have ruled on the question of "whether an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim is sufficient to render the claim moot." *Id.* at 952. The Ninth Circuit held that it is not. *See id.* at 950. The *Diaz* court acknowledged that the Ninth Circuit had not addressed the question specifically but instead merely *assumed* the answer to it:

> In *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011), we held "that an unaccepted Rule 68 offer of judgment - for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification - does not moot a *class action*" (emphasis added), but *we did not squarely address whether the offer mooted the plaintiff's individual claim*. We *assumed* that an unaccepted offer for complete relief will moot a claim, but we *neither held that to be the case nor analyzed the issue*. *See id.* at 1090-92.

Id. at 952 (emphases added). The *Diaz* court also noted that, "[a]lthough the majority of courts and commentators appear to agree with the Seventh Circuit that an unaccepted offer will moot a plaintiff's claim, four justices of the United States Supreme Court, as well as the Solicitor General of the United States, embraced a contrary position in *Genesis Healthcare*." *Id.* at 953, citing Brief for the United States as *Amicus Curiae* Supporting Affirmance in *Genesis Healthcare* (footnote omitted).[6]

The *Diaz* court then proceeded to quote, at length, the *Genesis Healthcare* dissent's discussion of whether an unaccepted Rule 68 offer that fully satisfies a plaintiff's claims moots those claims, *see id.* at 953-954; and, adopting the dissent's rationale, *Diaz* concluded as follows:

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[6] The Seventh Circuit opinion to which *Diaz* was referring is *Rand v. Monsanto*, *supra*, which is discussed in Point I, note 1, *supra*. In addition, the omitted footnote from the *Diaz* quotation cited two more Seventh Circuit cases: *Thorogood v. Sears, Roebuck & Co.*, 595 F.3d 750 (7th Cir. 2010), and *Greisz*, *supra*. In *Thorogood*, the issue was not whether, as a general matter, a claim is mooted by an unaccepted offer of judgment for a named plaintiff's maximum potential recovery on his individual claims, but weather the offer of judgment at issue was, in fact, for that maximum. *See Thorogood*, 595 F.3d at 752.

> We are persuaded that Justice Kagan has articulated the correct approach. *We therefore hold that an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot*. This holding is *consistent with the language, structure and purposes of Rule 68 and with fundamental principles governing mootness*. These principles provide that "[a] case becomes moot only when it is impossible for a court to grant 'any effectual relief whatever to the prevailing party.'" *Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)). Here, once [the defendant]'s offer lapsed, it was, *by its own terms and under Rule 68, a legal nullity* [].

Id. at 955 (emphases added).

In *Stein v. Buccaneers Ltd. P'ship,* No. 13-15417, – F.3d – , 2014 WL 6734819 (11th Cir. Dec. 1, 2014), the court likewise reasoned that, under the plain meaning of Rule 68, an unaccepted offer of judgment cannot moot a plaintiff's claims:

> Giving controlling effect to an unaccepted Rule 68 offer—dismissing a case based on an unaccepted offer as was done here—is *flatly inconsistent with the rule*. When the deadline for accepting these offers passed, they were *"considered withdrawn" and were "not admissible." See* Fed.R.Civ.P. 68(b). The plaintiffs could no longer accept the offers or require the court to enter judgment. In short, the plaintiffs still had their claims, and [the defendant] still had its defenses. [The defendant] had not paid the plaintiffs, was not obligated to pay the plaintiffs, and had not been enjoined from [violating the TCPA provision at issue]. *The named plaintiffs' individual claims were not moot.*

Id. at 3 (emphases added). The *Stein* court further explained, in reasoning that is fully applicable to Independence Energy' offer (as seen at A-23 - A-24), as follows:

> Our result draws further support from the terms [that the defendant] itself included in the offers of judgment. Each offer said:
>
>> This offer of judgment is made for the purposes specified in Federal Rule of Civil Procedure 68, and is not to be construed as either an admission that [the defendant] is liable in this action, or that

> the [plaintiff to whom the offer is directed] has suffered any damage. This Offer of Judgment shall not be filed with the Court unless (a) accepted or (b) in a proceeding to determine costs. The Plaintiff must serve written acceptance of this offer within fourteen (14) days, or this offer will be deemed rejected.

> So the offers made clear they would have *no effect—would not even be filed*—unless accepted or in a proceeding to determine costs.
>
> Just two days after saying its offers "shall not be filed," [the defendant] filed the offers. And *despite having said that if not accepted the offers would be "deemed rejected," [the defendant] now says, in effect, that the offers must be treated as having been accepted—as having obligated [the defendant] to pay the offered amounts and to comply with an injunction that was never issued. The terms of the offers will not bear that construction.*
>
> . . . *After the offers lapsed, . . . the legal relationship between [the defendant] and the named plaintiffs was precisely the same as before the offers were made: the named plaintiffs had claims against [the defendant] under the [TCPA]*; [the defendant] retained all [of] its defenses; no ruling had been made on the validity of the claims or defenses; and no judgment had been entered. [The defendant] had not paid the plaintiffs, was not obligated to pay the plaintiffs, and had not been enjoined from [violating the TCPA provision at issue]. The individual claims were not moot. The order dismissing this action must be reversed.

Id. at *4-*5 (emphasis added).

In *Boucher v. Rioux*, No. 14-cv-141, 2014 WL 4417914 (D.N.H. Sept. 8, 2014), the court noted that "[p]ost-*Genesis* jurisprudence in both the circuit courts and the district courts has taken a favorable view of Justice Kagan's dissent[,] . . . [t]he most notable application of [it being] the Ninth Circuit's decision in *Diaz*." *Id.* at *3. The *Boucher* court also noted that, in *Scott v. Westlake Services LLC*, 740 F.3d 1124 (7th Cir. 2014), "[t]he Seventh Circuit, which once held that a plaintiff forfeits his claim if he refuses a Rule 68 offer of judgment that fully satisfies his entire demand, *see Rand*, 926 F.2d at 596, questioned [the Seventh Circuit's previous] holding in light of Justice Kagan's dissent and *Diaz*." *Id.* (citation omitted).

The *Boucher* court further observed that, "[i]n the circuit courts, there are only two counterweights to *Diaz* and *Scott*, but they are very light." *Id.* at *4. First, *Boucher* noted that, in *Hrivnak v. NCO Portfolio Management, Inc.*, 719 F.3d 564 (6th Cir. 2013), "there was no reason for the court to reconsider [a pre-*Genesis Healthcare* Sixth Circuit precedent] because the *Hrivnak* 'defendants did not offer to satisfy all of [the plaintiff]'s individual demands.'" *Id.*, quoting *Hrivnak*, 719 F.3d at 568. For this reason, the *Boucher* court found that "*Hrivnak* cannot be counted as a rejection of Justice Kagan's reasoning." *Id.*

Second, the *Boucher* court, referring to *Doyle v. Midland*, *supra*, found that "the Second Circuit relied upon its earlier decision in *Abrams*, *supra*, to affirm the dismissal of a claim as moot, due to the defendant's unaccepted offer of judgment[,] [but] [t]he court did not cite Justice Kagan's dissent or reconsider [the prior case] . . . ; the only issue [] in *Doyle* was whether the district court correctly treated an oral offer at a motion hearing as a Rule 68 offer of settlement." *Id.*, citing *Doyle*, 727 F.3d at 80-81 (additional citation omitted). Thus, as *Boucher* noted, "[i]n short, neither *Hrivnak* nor *Doyle* gives this court any reason not to adopt the reasoning in Justice Kagan's dissent." *Id.*[7]

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[7] The *Boucher* court, having acknowledged that some post-*Genesis Healthcare* district courts found themselves to be foreclosed by their circuits' precedent, summarized the state of the post-*Genesis Healthcare* case law as follows:

> The long and the short of it is that since *Genesis* was decided: (1) two district courts in circuits without binding precedent barring application of the reasoning in Justice Kagan's dissent have adopted that reasoning; and (2) three district courts in circuits with binding precedent barring application of Justice Kagan's reasoning have

In *Delgado v. Castellino Corp.*, No. 13-cv-03379, 2014 WL 4339232 (D. Colo. Sept. 2, 2014), the court, which also followed the *Genesis Healthcare* dissent, initially noted as follows:

> On the one hand, four members of the dissent have indicated, in stark and unflinching terms, that they absolutely reject the notion that an unaccepted Offer of Judgment can operate to moot a plaintiff's claim. On the other hand, the majority's opinion carefully and deliberately avoids that question, acknowledging a Circuit split on the issue but expressly stating that "we do not reach this question, or resolve the split, because the issue is not properly before us." 133 S.Ct. at 1528-29. Rather, the majority merely assumes the applicability of a doctrine that the dissent so vigorously rejects, never actually endorsing it. . . .

Id. at *3. The court proceeded to adopt the rationale of the *Genesis Healthcare* dissent:

> Ultimately, this Court elects to err on the side of caution, allowing [the plaintiff]'s claims to proceed. Four Justices of the Supreme Court emphatically reject the notion that an unaccepted Offer of Judgment can render a claim moot. If the majority in *Genesis* had affirmed that doctrine, or even expressed some support for it, this Court might be inclined to concede the doctrine's continuing vitality. But they did not — beyond acknowledging the existing Circuit split on the question and carefully construing the grant of certiorari to avoid reaching that matter, the majority gave no signal that it viewed the "mootness-by-unaccepted-offer theory" with any degree of favor. . . . As between extremely vocal opponents of the doctrine on one side, and an absence of any vocal proponents for it on the other, this Court is compelled to conclude that the doctrine is waning in power.

Id.

> indicated their approval of her approach, but were precluded by circuit precedent from adopting it. What the court has been unable to locate, despite a diligent search, is even a single district-court opinion, from a circuit that has not weighed in on the issue, that rejects Justice Kagan's reasoning. The jurisprudence as a whole counsels in favor of adopting the reasoning of Justice Kagan and *Diaz*.

Id. at *7.

In *Bais Yaakov of Spring Valley v. Act, Inc.*, No. 12-cv-40088, 2013 WL 6596720 (D. Mass. Dec. 16, 2013), the court also invoked the reasoning of the *Genesis Healthcare* dissent and *Diaz*, ruling that the named plaintiff's individual claims were not moot:

> The ability of a plaintiff to accept or reject the offer of judgment is what Justice Kagan emphasizes when she finds [that] an unaccepted offer of judgment cannot moot a claim . . . . *See Genesis Healthcare,* 133 S.Ct. at 1532-38 (Kagan, J. dissenting).
>
> With no controlling precedent in the First Circuit, this Court has looked to the reasoning expressed by other courts on this issue, and is *persuaded by that expressed [by] the Ninth Circuit* in *Diaz* and *by Justice Kagan's dissent* in *Genesis Healthcare.* By its terms, Rule 68 gives plaintiff the ability to *either accept or reject an offer*, and gives a court authority to "enter judgment *only* when a plaintiff accepts an offer." *Genesis Healthcare,* 133 S.Ct. at 1536 (Kagan, J. dissenting) . . . *An "offer," rather than "order," "ruling," or other like terms, gives the offeree the ability to accept its terms or reject it and proceed unhindered.*

Id. at *4 (emphases added).

Independence Energy notes that this Court, in *Bank v. Caribbean Cruise Line, LLC*, No. 12-cv-05572 (E.D.N.Y.), "dismiss[ed] Plaintiff Todd Bank's allegations under the TCPA based on offer of judgment that Plaintiff permitted to expire." Def. Mem. at 7. However, Independence Energy fails to note that an appeal of this ruling is pending. *See* 2d Cir. No. 14-4720 (oral argument is scheduled for May 29, 2015). Independence Energy also cites *Bank v. Spark Energy Holdings, LLC*, No. 13-cv-6130, 2014 WL 2805114 (E.D.N.Y. June 20, 2014), for "noting that '[t]he Second Circuit agrees that a rejected Rule 68 offer for complete relief can render a plaintiffs claim moot ... ,'" Def. Mem. at 8, but fails to note that the footnote containing that quotation was from that paragraph of the opinion's text explicitly stating that the issue of whether an unaccepted offer of judgment could moot a claim was not before the court because no offer had been made.

As with respect to *Bank v. Spark Energy*, Independence Energy cites *Aleman v. Innovative Elec. Servs. L.L.C.*, No. 14-cv-868, 2014 WL 4742726 (S.D.N.Y. Sept. 15, 2014), for the same proposition but fails to note that the question of whether an unaccepted offer of judgment could moot a claim was not before the court, as the "plaintiffs argue[d] only that the motion to dismiss should be denied because plaintiffs have not yet moved for attorney's fees." *Aleman*, 2014 WL 4742726, *3, n.3.

In sum, the only result of an unaccepted Rule 68 offer of judgment is that, as the plain language of the Rule 68 states, the offer is deemed withdrawn.

POINT II

THE CLASS CLAIMS ARE NOT MOOT

A. Under the Relation-Back Doctrine, Plaintiff's Class Claims Would Have Remained Viable Even if Plaintiff's Individual Claims Had Been Mooted

Numerous courts in this Circuit have held that, where an offer of judgment moots the individual claims of a putative class representative before a motion for class certification has been made, the class claims remain viable unless the plaintiff had been dilatory in seeking class certification. *See Thomas v. American Serv. Fin. Corp.*, No. 12-cv-4235, 2013 WL 1898954, *7-9 (E.D.N.Y. May 7, 2013); *Herzlinger v. Nichter*, No. 09-cv-00192, 2011 WL 4585251, *8 (S.D.N.Y. Sept. 8, 2011), *adopted*, No. 09-cv-00192, 2011 WL 4575126, *1 (S.D.N.Y. Oct. 3, 2011); *McDowall v. Cogan*, 216 F.R.D. 46, 51 (E.D.N.Y. 2003); *Morgan v. Account Collection Technology, LLC*, No. 05-cv-2131, 2006 WL 2597865, *8 (S.D.N.Y. Sept. 6, 2006); *Vega v. Credit Bureau Enters.*, No. 02-cv-1550, 2003 WL 21544258, *2 (E.D.N.Y. July 9, 2003); *Nasca v. GC Services Ltd. Fartnership*, No. 01-cv-10127, 2002 WL 31040647, *3 (S.D.N.Y. Sept. 12, 2002); *White v. OSI*

Collection Services, Inc., No. 01-CV-1343, 2001 WL 1590518, *5-6 (E.D.N.Y. Nov. 5, 2001).

In *McDowall*, *supra*, the court held "that if a defendant wishes to make an offer of judgment prior to class certification in the interests of effecting a reasonable settlement and avoiding the costs and inefficiencies of litigation, it must do so *to the putative class and not to the named plaintiff alone*." *McDowall*, 216 F.R.D. at 51 (emphasis added). The *McDowall* court reasoned that "defendants should [not] be allowed to force plaintiffs into hastily-drafted certification motions . . . before the record for such [a] motion [was] complete—indeed before an [a]nswer [was] filed." *Id.* at 51. The *McDowall* court further reasoned that, absent the relation-back doctrine, there would be "a race to the courthouse between defendants armed with uninformed offers and plaintiffs with under-researched certification motions." *Id.*

Other courts in this Circuit that have reached the same conclusion as did *McDowell* employed similar reasoning. *See, e.g. Herzlinger*, *supra*, 2011 WL 4585251, *8 ("[t]his Court cannot conclude that [the] [p]laintiff's counsel . . . acted in bad faith on the basis that his client refused to accept an offer of judgment made to [the] [p]laintiff (1) only in her individual capacity, (2) prior to the time that [the] [d]efendants answered the complaint, (3) long before the deadline for class certification motions, and (4) which would have required her to abandon the claims of the putative class."); *Morgan*, *supra*, 2006 WL 2597865, *8 ("[the] [p]laintiff's claims ought not to be rendered moot by an offer of judgment submitted before counsel has a reasonable opportunity to compile a record necessary to support a motion for class certification," quoting *Vega*, *supra*, 2003 WL 21544258, *2); *Nasca*, *supra*, 2002 WL 31040647, *3 ("[the plaintiff] has not yet had a reasonable opportunity to file a motion for certification. Less than two months after it filed its answer, and one month after the initial conference, [the defendant] submitted its Rule 68 offer. . . . To allow a Rule 68 offer to moot a named plaintiff's claim in these circumstances would encourage defendants to pick off named plaintiffs in the earliest stage of the case."); *White*, *supra*, 2001 WL 1590518, *5-6 ("when [a] defendant's offer of judgment comes very early in the litigation and before a plaintiff, who has indicated in her complaint her intention to pursue the claim in a representative manner, can reasonably bring a motion to certify[,] it is proper to apply the relation back exception even though no motion for class certification has yet been filed.").

Both circuit courts to have addressed the issue of whether *Genesis Healthcare* abrogated the relation-back doctrine in Rule 23 class actions have held in the negative. *See Stein v. Buccaneers Ltd. P'ship,* No. 13-15417, – F.3d – , 2014 WL 6734819, *3-*11 (11th Cir. Dec. 1, 2014); *see also Mabary v. Home Town Bank, N.A.*, No. 13-20211, – F.3d – , 2014 WL 5801352 (5th Cir. Nov. 5, 2014), in which the court explained that "[t]he Supreme Court [in *Genesis Healthcare*] rejected the plaintiff's reliance on Rule 23 class action cases, explaining that 'Rule 23 actions are fundamentally different from collective actions under the FLSA.'" *Id.* at *3, quoting *Genesis Healthcare*, 133 S.Ct. at 1529 (footnote omitted).

Genesis Healthcare found that three Rule 23 precedents, *i.e.*, *Sosna v. Iowa*, 419 U.S. 393 (1975), *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1980), and *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980), "are inapposite," *Genesis Healthcare*, 133 S. Ct. at 1529, not only because they were "by their own terms, inapplicable to the[] facts [in *Genesis Healthcare*]," *id.*, but also because "Rule 23 actions are *fundamentally different* from collective actions under the FLSA." *Id.* (emphasis added). As the Court explained:

> More fundamentally, essential to our decisions in *Sosna* and *Geraghty* was the fact that a putative class acquires an independent legal status once it is certified under Rule 23. Under the FLSA, by

> contrast, "conditional certification" does not produce a class with an independent legal status, or join additional parties to the action. The sole consequence of conditional certification is the sending of court-approved written notice to employees, who in turn become parties to a collective action only by filing written consent with the court, [29 U.S.C.] § 216(b). So even if [the plaintiff] were to secure a conditional certification ruling on remand, nothing in that ruling would preserve her suit from mootness.

Id. at 1530 (citation omitted). While the Court's discussion of the three Rule 23 precedents indicated that the relation-back doctrine likely would apply in an FLSA collective action if the facts in a particular case were comparable to the facts in any of those precedents, the question of whether the facts in the present case are so comparable need not be addressed, as the Court's reliance upon the differences between FLSA collective actions and Rule 23 class actions negates the notion that *Genesis Healthcare* is applicable to Rule 23 class actions.

B. Plaintiff's Interest in Sharing the Expenses of this Action With the Putative Class Members Satisfies the 'Case or Controversy' Requirement

Further making it clear that *Genesis Healthcare* does not apply in Rule 23 class actions, *Genesis Healthcare* pointed out that the Court, in a previous case, had held that the defendant's offer of judgment for the maximum potential recovery of the named plaintiffs following the district court's denial of Rule 23 class certification did not moot the class claims, and that, therefore, the named plaintiffs could appeal the denial of certification despite the (assumed) mootness of their individual claims. *See Genesis Healthcare*, 133 S. Ct. at 1531-1532, discussing *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1980).[8] As *Genesis Healthcare* explained:

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[8] The question that *Roper* addressed was not whether the named plaintiffs' individual claims were moot but, rather, "whether a tender to named plaintiffs in a class action of the amounts claimed in their individual capacities, followed by the entry of judgment in their favor on the basis of that tender, over their objection, *moots the case and terminates their right to appeal the denial of class certification*." *Roper*, 445 U.S. at 327 (emphasis added).

> In *Roper,* the named plaintiffs' individual claims became moot after the District Court denied their motion for class certification under Rule 23 and subsequently entered judgment in their favor, based on the defendant[]'s offer of judgment for the maximum recoverable amount of damages, in addition to interest and court costs. The [*Roper*] Court held that even though the District Court had entered judgment in the named plaintiffs' favor, they could nevertheless appeal the denial of their motion to certify the class. The Court found that, under the particular circumstances of that case, the named plaintiffs possessed an *ongoing, personal economic stake* in the substantive controversy—*namely, to shift a portion of attorney's fees and expenses to successful class litigants*. Only then, in dicta, did the Court underscore the importance of a district court's class certification decision and observe that allowing defendants to "pic[k] off" party plaintiffs before an affirmative ruling was achieved "would frustrate the objectives of class actions."
>
> . . . *Roper*'s dictum was tethered to the *unique significance of certification decisions in [Rule 23] class-action proceedings. Whatever significance "conditional certification" may have in [FLSA] proceedings, it is not tantamount to class certification under Rule 23*.

Genesis Healthcare, 133 S. Ct. at 1531-1532 (emphases added; footnote and citations omitted).[9] As *Roper* summarized, "[w]e can assume that a district court's final judgment fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment; however, it does not follow that this circumstance would terminate the named plaintiffs' right to take an appeal on the issue of class certification." *Roper*, 445 U.S. at 333. In the present case as in *Roper*, Plaintiffs have an interest in spreading their expenses among the putative class members.

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[9] In the omitted footnote, the Court stated as follows: "[b]ecause *Roper* is distinguishable on the facts, we need not consider its continuing validity in light of our subsequent decision in *Lewis* v. *Continental Bank Corp.*, 494 U. S. 472 (1990). *See id.*, at 480 ('[An] interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim')." *Genesis Healthcare*, 133 S. Ct. at 1532, n.5. Even assuming, *arguendo*, that a named plaintiff's interest in the sharing of his *legal fees* is insufficient to satisfy Article III, there has been no suggestion that the interest in sharing *expenses* is insufficient.

C. Numerous Post-*Genesis Healthcare* Cases Have Held That *Genesis Healthcare* Does Not Apply to Rule 23 Class Actions

In Wigton v. Kaplan, No. 10-cv-01768, 2014 WL 4272791 (W.D. Pa. Aug. 29, 2014), the court found that *Genesis Healthcare* did not apply to Rule 23 actions:

> [T]he Court unequivocally held in [*Genesis Healthcare*] that its Rule 23 jurisprudence was inapposite to the FLSA analysis because "Rule 23 actions are fundamentally different from collective actions under the FLSA." [*Genesis Healthcare*, 133 S.Ct. at 1529]. . . .
>
> More importantly, *it is plain that under current Third Circuit precedent, where there is not an undue delay in moving for class certification, the motion for such certification relates back to the filing of the class complaint*. *Weiss* [*v. Regal Collections*], 385 F.3d [337] at 348 [(3d Cir. 2004)]; *see Weitzner v. Sanofi Pasteur, Inc.*, [No. 11-cv-2198,] 2014 WL 956997, at *5-6 (M.D. Pa. Mar. 12, 2014), *amended*, 2014 WL 1786500 (M.D. Pa. May 5, 2014). *The Weitzner court also recited the cavalcade of cases which have held that the [Genesis Healthcare] holding was limited to FLSA collective actions, taking the Supreme Court's statements of the non-relation to Rule 23 class claims at their word*. *See Weitzner*, 2014 WL 956997 at *7. This Court concludes that . . . the rule in *Weiss* remains the applicable rule of decision in these regards.

Id. at *7, n.8 (emphases added). *Accord*, *March v. Medicredit, Inc.*, No. 13-cv-01210, 2013 WL 6265070 (E.D. Mo. Dec. 4, 2013).

In *Bais Yaakov of Spring Valley v. Act, Inc.*, No. 12-cv-40088, 2013 WL 6596720 (D. Mass. Dec. 16, 2013), the court ruled as follows:

> A plaintiff seeking to represent a class should be permitted to *accept an offer of judgment on her individual claims under Rule 68, receive her requested individual relief, and have the case dismissed, or reject the offer and proceed with the class action*. Here, [the] [p]laintiff chose the latter course, and, *having allowed the offer to lapse, still has an unsatisfied claim that can be redressed by the Court*. This case, therefore, *has not been rendered moot*, and the Court retains

> subject matter jurisdiction.

Id. at *4 (emphases added).

In *Sandusky Wellness Center LLC v. Medtox Scientific, Inc.*, No. 12-cv-2066, 2013 WL 3771397 (D. Minn. July 18, 2013), the court explained:

> Although *Genesis* declined to "resolve the question of whether a Rule 68 offer that fully satisfies the plaintiff's claims [in the Rule 23 context] is sufficient by itself to moot the action," [*Genesis Healthcare*, 133 S. Ct.] at 1529 n. 4, it *noted several differences between collective and class actions. Specifically, the Court distinguished FLSA collective actions from class actions*, explaining that in the former, "conditional certification does not produce a class with an independent legal status," whereas a "putative class acquires an independent legal status once it is certified under Rule 23." *Id.* at 1530 (citation and internal quotation marks omitted). In doing so, the Court ignored Rule 23 precedent, explaining that "*these cases are inapposite ... because Rule 23 actions are fundamentally different from collective actions under the FLSA*." *Id.* at 1529. In other words, *Genesis* is *inapplicable to a Rule 23 action brought under the [Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA").]* *See, e.g.*, *Chen v. Allstate Ins. Co.*, No. C 13-0685, 2013 WL 2558012, at *7 (N.D.Cal. June 10, 2013) [*appeal pending* (9th Cir., No. 13-80177)] (finding that *Genesis* "is not directly applicable to the class action context"); *Falls v. Silver Cross Hosp. & Med. Ctrs.*, No. 13 C 695, 2013 WL 2338154, at *1 (N.D.Ill. May 24, 2013) (same).

Id. at *2 (emphases added).

In Ramirez v. Trans Union, LLC, No. 12-cv-00632, 2013 WL 3752591 (N.D. Cal. July 17, 2013), the court likewise pointed to *Genesis Healthcare*'s reliance upon the differences between FLSA collective actions and Rule 23 class actions:

> The . . . court [in *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011)] ruled: "we hold that an unaccepted Rule 68 offer of judgment —for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification—does not moot a class action." *Pitts*, 652 F.3d at 1091-

> 92. . . .
>
> ***
>
> [*Genesis Healthcare*] is an FLSA collective action, whereas *Pitts* is a Rule 23 class action. *The Supreme Court explicitly distinguished between the scenario presented by* [*Genesis Healthcare*]*, an FLSA action, as opposed to a Rule 23 class action*. Calling Rule 23 cases "*inapposite*" and "*inapplicable*" to an FLSA claim, the Court declined to apply case law from Rule 23 actions "because *Rule 23 actions are fundamentally different from collective actions under the FLSA*." *Id.* at 1524. The Rule 23 cases the Court cited to as inapplicable to [the *Genesis Healthcare* plaintiff]'s FLSA lawsuit included three cases cited by the Ninth Circuit in *Pitts*: *Geraghty*, *Roper*, and *Sosna*. *See* [*Genesis Healthcare*], 133 S.Ct. at 1530-32. [*Genesis Healthcare*]'s delineation between Rule 23 class actions and FLSA collective actions bars a finding that [*Genesis Healthcare*] is "clearly irreconcilable" with *Pitts*. *See Canada v. Meracord, LLP*, C12-5657 BHS, 2013 WL 2450631, at *1 (W.D. Wash. June 6, 2013) (calling *Pitts* "directly on point" and stating, "*there is nothing to indicate that the* [*Genesis Healthcare*] *holding extends beyond FLSA collective actions*"); *Chen v. Allstate Ins. Co.* [No. 13-cv-6085], 2013 WL 2558012, at *8 (N.D. Cal. June 10, 2013) [*appeal pending* (9th Cir., No. 13-80177)] ("*Genesis*, which was *an FLSA collective action*, is *easily distinguishable* from *Pitts*.").

Id. at *2-*3 (emphases added).

In *Church v. Accretive Health, Inc.*, 299 F.R.D. 676, 679 (S.D. Ala. 2014), the court likewise found that *Genesis Healthcare* is limited to FLSA collective actions. *See id.* at 679 ("[t]he premise that a Rule 68 offer of judgment moots a class action in the absence of a prior Rule 23 motion is a decidedly minority view.").[10]

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[10] The court further noted that costs to judicial economy would result from premature class-certification motions that are filed for the sole purpose of preserving class claims in the event of an offer of judgment:

> [The plaintiff]'s "placeholder" [m]otion for [c]lass [c]ertification is highly unlikely to confer any meaningful benefit or protection on plaintiff.

Finally, in *Jenkins v. Pech*, No. 14-cv-41, 2014 WL 4247734 (D. Neb. Aug. 27, 2014), the court found that the offer of judgment did not equal the individual plaintiff's maximum potential recovery, but explained, in dicta, why *Genesis Healthcare* was inapplicable in Rule 23 actions:

> The court rejects the defendants' argument that the timing of the offer of judgment (preceding the motion for class certification) weighs in favor of granting their motion. . . . The plaintiff did not drag her feet in filing for class certification. To allow defendants to avoid liability for its allegedly class-wide wrongs merely by racing to proffer settlement offers effectively denying all putative plaintiffs' claims at the inception of a case would be bad policy and would effectively eviscerate the effectiveness of class action lawsuits in cases such as this one where individual damages are relatively small and not worthy of individual efforts to recover.

Id. at *6 (emphases added). *Accord*, *Prater v. Medicredit, Inc.*, No. 14-cv-159, 2014 WL 3973863, *2 (E.D. Mo. August 14, 2014).

> On the other side of the ledger, [the plaintiff]'s course of action comes with a cost. The court file is burdened with an obviously premature Rule 23 Motion that is devoid of content. Clerk's Office staff would be required to track, monitor and report the motion for many months as it sits idly, collecting dust, while the plaintiff gathers information via discovery to populate the motion with actual substance. In addition to this administrative cost, plaintiff's actions promote inefficiency and waste. Not only is it premature, but the Rule 23 Motion filed now may prove unnecessary because plaintiff may think better of pursuing such a motion based on the results of discovery. Yet plaintiff advocates a system in which litigants race to the courthouse to file empty, placeholder motions that may or may not ever be litigated, and that are neither required nor encouraged by the Federal Rules of Civil Procedure. *See Weiss v. Regal Collections,* 385 F.3d 337, 347 (3rd Cir. 2004) (*federal rules do not "require or encourage premature certification determinations"*). Such a proposal contravenes the spirit of federal practice, and raises significant concerns as to efficiency and judicial economy.

Church, 299 F.R.D. at 679 (emphasis added).

POINT III

DEFENDANTS HAVE NOT MET THEIR BURDEN FOR OBTAINING SUMMARY JUDGMENT

The sole basis for Independence Energy's contention that Bank lacks standing is the following finding made by this Court in ruling upon Independence Energy's previous Rule 12(b)(6) motion: "'businesses should be able to gather numbers from public directories or websites that list business telephone numbers (such as the Yellow Pages) under the assumption that such lines are not residential. A telephone subscriber who registers a line with the telephone company as a residential line but then lists the number in the Yell ow Pages and other directories as a business line sacrifices the protections afforded by the TCPA.'" Def. Mem. at 12, quoting Order dated Oct. 2, 2014, Dkt. No. 37, at 6-7.

First, the very reasonable implication of the above-quoted passages is that a defendant should not be held liable for calling a person at his residence when the defendant has obtained that person's telephone number from a business directory or listing. However, Independence Energy has not shown that this was the case; and, to be sure, the burden of showing how a plaintiff's telephone number was obtained should, based on common sense, be on the defendant, as only the defendant is in a position to create and maintain such records. Even aside from the irony that one of the listings upon which Independence Energy relies to show that Bank's number was listed as a business number was instead listed as a residential number (*see* Declaration of Todd C. Bank, ¶ 2), Independence Energy has never produced any indication of how Bank's number was obtained. Independence Energy has sought to portray Bank as seeking to unfairly take advantage of the fact that his "business" telephone number belongs to his residence. However, if the source of that telephone number was a residential directory or listing, then it would be Independence Energy that would be seeking to take advantage of the lucky (that is, lucky to Independence Energy) fact that Bank happens to also use the telephone number for business purposes. While the implication of this Court's above-quoted passage is perfectly reasonable (at least in the view of Bank), the fact that Bank should not be able to take advantage of fortuitous circumstances should be part of a larger equation; the other half being that a telemarketer should likewise not be able to seek such an advantage, either.

Just as the court in *Gottlieb v. Carnival Corp.*, 595 F. Supp. 2d 212 (E.D.N.Y. 2009), noted, with respect to the TCPA's fax-advertisement provision (Section 227(b)(1)(C)), that "'[w]hile telemarketers will be responsible for determining whether a potential recipient of an advertisement, in fact, has invited or given permission to receive such fax messages, such a responsibility is the minimum necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner's uses of his or her fax machine,'" *id.* at 220, quoting S.Rep. No. 102-178, at 7-8, 1991 U.S.C.C.A.N. 1968, at 1975-76 (1991), so, too should a telemarketer be responsible for determining how a recipient's telephone number was obtained, just as that issue bears (or, as Bank argues, certainly should bear) on liability just as does the issue addressed in *Gottlieb* (*i.e.*, consent) bears on liability.

CONCLUSION

Based upon the foregoing and any other reasons that might be discerned from the record, Plaintiff respectfully requests that this Court: (1) deny Defendant's motion in its entirety; and (2) grant Plaintiff any additional relief authorized by law.

Dated: May 18, 2015

Respectfully submitted,

s/ ***Todd C. Bank***

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2015, a true and accurate copy of the foregoing document was filed electronically. Notice of this filing will be sent to counsel all parties by operation of the Court's electronic filing system. Counsel for the non-serving party is a Filing User and is served electronically by the Notice of Docket Activity.

s/ *Todd C. Bank*
TODD C. BANK
Dated: May 18, 2015